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06 UNITED STATES DISTRICT COURT
07 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

08 ERICK HERNANDEZ,) CASE NO. C08-0498-JLR
09)
Petitioner,)
10)
v.) SUPPLEMENTAL REPORT AND
11) RECOMMENDATION
A. NEIL CLARK, et al.,)
12)
Respondents.)
13

14 I. INTRODUCTION AND SUMMARY CONCLUSION

15 On March 28, 2008, petitioner Erick Hernandez, proceeding pro se, filed a “Petition for
16 Writ of Habeas Corpus and Petition for Declaratory Relief under 28 U.S.C. 2241,” challenging
17 his detention by the U.S. Immigration and Customs Enforcement (“ICE”). (Dkt. 4). Petitioner
18 requested that he be released pending adjudication of his Petition for Review in the Ninth Circuit
19 Court of Appeals, arguing that his mandatory detention under Section 236(c) of the Immigration
20 and Nationality Act (“INA”), 8 U.S.C. § 1226(c), was indefinite under *Zadvydas v. Davis*, 533
21 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001). Respondents moved to dismiss, arguing
22 that petitioner’s detention was mandated by INA § 236(c), because he had been convicted of an

01 aggravated felony. (Dkt. 11).

02 On June 25, 2008, the undersigned Magistrate Judge issued a Report and Recommendation
03 (“R&R”) which recommended that petitioner’s habeas petition be denied, finding that petitioner’s
04 detention under INA § 236(c) was lawful and authorized by statute. (Dkt. 13). On July 21, 2008,
05 the Honorable James L. Robart, United States District Judge, adopted the R&R and dismissed the
06 habeas petition. (Dkt. 14).

07 On August 7, 2008, however, petitioner filed an untimely motion for reconsideration,
08 arguing that he is entitled to relief under two recently published decisions issued by the Ninth
09 Circuit Court of Appeals on July 25, 2008, *Casas-Castrillon v. D.S.H.*, 535 F.3d 942 (9th Cir.
10 2008) and *Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008). (Dkt. 16). Judge Robart
11 initially denied the motion for reconsideration as untimely, Dkt. 17, but reversed his decision after
12 consideration of petitioner’s Renewed Motion for Reconsideration, Dkt. 18, which explained that
13 petitioner was unable to timely file a motion for reconsideration due in part to a chicken pox
14 outbreak at the Northwest Detention Center where he resides. Judge Robart referred the matter
15 to the undersigned Magistrate Judge for an R&R addressing the application of *Casas-Castrillon*
16 and *Prieto-Romero* to petitioner’s petition for writ of habeas corpus. (Dkt. 22).

17 Following a careful review of the record, I recommend that petitioner’s renewed motion
18 for reconsideration, Dkt. 18, be DENIED.

19 II. BACKGROUND AND PROCEDURAL HISTORY

20 The factual and procedural background of this case is related in the Court’s previously-
21 issued R&R. (Dkt. 13). Accordingly, the Court will not repeat it here. However, a brief
22 summary of the history of this case following the issuance of that R&R follows.

01 At the time the R&R was issued on June 25, 2008, petitioner's Petition for Review of the
02 BIA's final order of removal was pending in the Ninth Circuit, and a temporary stay of removal
03 was in effect. *See Hernandez v. Mukasey*, No. 08-71098 (9th Cir. Oct. 15, 2008). On August 13,
04 2008, however, the Ninth Circuit issued an Order denying petitioner's motion for stay of removal
05 pending review and denying his motion to proceed in forma pauperis. *Id.* The Order directed
06 petitioner to pay the filing fee, warning that failure to pay the fee would result in the automatic
07 dismissal of the petition for failure to prosecute. *Id.* (Dkt. 30 at R261-62). On October 15, 2008,
08 the Ninth Circuit dismissed the petition for failure to prosecute, and the mandate issued on
09 November 5, 2008. *Id.* (Dkt. 30 at R272-73).

10 On March 20, 2008, petitioner filed a motion to reopen his case before the Immigration
11 Judge ("IJ"). (Dkt. 30 at L221-236). The IJ denied the motion to reopen on April 2, 2008, and
12 the Board of Immigration Appeals ("BIA") affirmed the IJ's decision on July 2, 2008. (Dkt. 30
13 at L183, L289-90). Petitioner filed a Petition for Review of the BIA's decision denying his motion
14 to reopen in the Ninth Circuit, along with a motion for stay of removal. *See Hernandez v.*
15 *Mukasey*, No. 08-73360 (9th Cir. filed August 4, 2008). Pursuant to Ninth Circuit General Order
16 6.4(c)(1)(3), this caused a temporary stay to automatically issue. Petitioner's petition for review
17 of the BIA's decision denying his motion to reopen remains pending. *See id.*

18 On or about June 11, 2008, ICE conducted a File Custody Review of petitioner's case.
19 (Dkt. 30 at R201-208). On June 13, 2008, ICE Field Office Director A. Neil Clark issued a
20 decision to continue detention, finding that petitioner "could be a flight risk and could be a threat
21 to the community." (Dkt. 30 at R210-11).

22 At the request of petitioner, a bond hearing was held on October 2, 2008, before an

01 Immigration Judge who declined to set bond. (Dkt. 30 at L315). Petitioner has appealed the IJ's
02 bond decision to the BIA, which remains pending. (Dkt. 30 at L318-20).

03 III. DISCUSSION

04 Section 236 of the INA provides the framework for the arrest, detention, and release of
05 aliens in removal proceedings. That provision provides the Attorney General with discretionary
06 authority to release an alien on bond or conditional parole pending the completion of removal
07 proceedings, unless the alien falls within one of the categories of criminal aliens described in
08 Section 236(c), for whom detention is mandatory. *See* INA § 236(c), 8 U.S.C. § 1226(c) ("The
09 Attorney General shall take into custody any alien who" is deportable for having committed certain
10 enumerated crimes).

11 Once removal proceedings have been completed, the detention and release of aliens shifts
12 to INA § 241, 8 U.S.C. § 1231. Section 241(a)(1)(A) of the INA states that "when an alien is
13 ordered removed, the Attorney General shall remove the alien from the United States within a
14 period of 90 days (in this section referred to as the 'removal period')." INA § 241(a)(1)(A), 8
15 U.S.C. § 1231(a)(1)(A). During the removal period, continued detention is required. INA §
16 241(a)(2), 8 U.S.C. § 1231(a)(2). Section 241(a)(6) provides the Attorney General with
17 discretionary authority to detain certain aliens beyond the removal period, or to release them under
18 an order of supervision. INA § 241(a)(6), 8 U.S.C. § 1231(a)(6). *See Zadvydas*, 533 U.S. at 701
19 (adopting a presumptively reasonable period of detention under INA §241(a)(6) of six months).

20 The determination of when an alien becomes subject to detention under Section 241 rather
21 than Section 236 is governed by Section 241(a)(1), which provides:

22 The removal period begins on the *latest* of the following:

01 (i) The date the order of removal becomes administratively final.

02 (ii) If the removal order is judicially reviewed and if a court orders a stay of the
03 removal of the alien, the date of the court's final order.

04 (iii) If the alien is detained or confined (except under an immigration process), the
05 date the alien is released from detention or confinement.

06 8 U.S.C. § 1231(a)(1)(B)(emphasis added).

07 Respondents argue that the statutory basis for petitioner's detention shifted from INA §
08 236(a) to INA § 241(a)(2) upon the Ninth Circuit's dismissal of his petition for review.
09 Respondents contend that petitioner's detention is now mandatory for a ninety-day period
10 beginning November 5, 2008. (Dkt. 28 at 4). Petitioner argues that he is detained under INA §
11 236(a) pursuant to *Casas-Castrillon*, 535 F.3d at 942, and *Prieto-Romero*, 534 F.3d at 1053, and
12 that he is entitled to a bond hearing. (Dkt. 18 at 4-6). The Court agrees with respondents that
13 petitioner is now subject to statutory mandatory detention under INA § 241(a)(2).

14 As respondents argue, petitioner's removal period began on November 5, 2008, pursuant
15 to INA § 241(a)(1)(B)(ii) when the Ninth Circuit dismissed his petition for review of the BIA's
16 final order of removal. Although petitioner filed another petition for review in the Ninth Circuit,
17 resulting in a stay of removal which remains pending, that appeal does not "entail judicial review
18 of a *removal order*, as the plain text of the statute requires." *Diouf v. Mukasey*, 542 F.3d 1222,
19 1230 (9th Cir. September 18, 2008). Rather, petitioner's appeal challenges the BIA's denial of
20 his motion to reopen, not his removal order. Accordingly, petitioner's detention is now governed
21 by INA § 241(a)(2).

22 The Ninth Circuit's recent decision in *Diouf* supports this conclusion. In *Diouf*, the Ninth
Circuit reversed a decision by the district court which had granted habeas relief to a petitioner who

01 had been detained for twenty-three months pending judicial review of the BIA’s denial of his
02 motion to reopen removal proceedings. *Diouf*, 542 F.3d at 1222. The Ninth Circuit concluded
03 that the district court had erred because its decision was based on the erroneous conclusion that
04 Diouf’s detention was governed by INA § 236 rather than INA § 241. *Id.* The court held that “a
05 stay entered while a court reviews an alien’s . . . *petition for review of the BIA’s denial of a*
06 *motion to reopen* – does not prevent the removal period from beginning. *Id.* at 1230.

07 The court referred to its recent decisions in *Prieto-Romero* and *Casas-Castrillon* as
08 support for its decision, noting that in those cases

09 we made clear that the statutory basis for the petitioner’s detention would have been
10 different if the pending petition for review had not challenged an administratively final
11 order of removal, explaining that the “beginning of the removal period is not delayed
12 by *every* judicially entered stay,” and that the “entry of a stay of removal for any . .
reason [other than review of a removal order] – for example, a stay entered while
a court reviews an alien’s § 2241 habeas petition or petition for review of the BIA’s
denial of a motion to reopen – does not prevent the removal period from beginning.

13 *Id.* (citations omitted).

14 Petitioner’s assertion that he is detained under INA § 236(a) relies on the fact that the
15 Ninth Circuit had issued a stay of removal during his then pending petition for review which had
16 challenged the BIA’s final order of removal. As indicated above, however, the Ninth Circuit
17 dismissed that petition on October 15, 2008, and the mandate issued on November 5, 2008,
18 thereby commencing the removal period. Petitioner’s ninety-day removal period will expire on
19 or about February 5, 2009, and the six month presumptively reasonable period will expire on or
20 about May 5, 2009. Accordingly, petitioner’s detention is mandated by INA § 241(a)(2), and the
21 Court must deny habeas relief.

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01 IV. CONCLUSION

02 For the foregoing reasons, I recommend that this action be dismissed with prejudice. A
03 proposed Order accompanies this Report and Recommendation.

04 DATED this 20th day of November, 2008.

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06 Mary Alice Theiler
07 United States Magistrate Judge
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